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U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
DEC 18 2006
CLERK, U.S. DISTRICT COURT
By ____________ Deputy

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

Steve Weinberg, Plaintiff, vs. National Football League Players Association, Richard Berthelsen, Gene Upshaw, Tom DePaso, Trace Armstrong, Roger Kaplan, John Collins, Keith Washington, Tony Agnone, Howard Shatsky, and Mark Levin, Defendants.	§	3-06CV2332-B Case No. ____________

DEFENDANTS' NOTICE OF REMOVAL

NOTICE IS HEREBY GIVEN that, pursuant to 28 U.S.C. §§ 1441 and 1446, Defendants National Football League Players Association ("NFLPA"), Richard Berthelsen, Gene Upshaw, Tom DePaso, Trace Armstrong, Keith Washington, John Collins, and Mark Levin remove to this Court the state court action described below.[1] All other Defendants in this action, Roger Kaplan, Tony Agnone, and Howard Shatsky, consent to the removal.

INTRODUCTION

1. Plaintiff Steve Weinberg served as an NFLPA Contract Advisor until the union began a decertification procedure against him on or about February 2003 for engaging in behavior in violation of the NFLPA's Agent Regulations ("Regulations").

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[1] Defendants specifically preserve and do not waive any and all applicable defenses, including, without limitation, those pursuant to Federal Rule of Civil Procedure 12 and any right to demand arbitration. Moreover, certain parties may challenge Texas' in personam jurisdiction over them.

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2. On or about November 20, 2006, Mr. Weinberg filed his First Amended Petition in Steve Weinberg v. National Football League Players Assoc., et al., Cause No. 06-11845, in the District Court for the 95th Judicial District of Dallas County, Texas (the "Petition"). Thirty days have not expired since it was first ascertainable that the action was removable, making this Notice of Removal proper pursuant to 28 U.S.C. § 1446(b). As required by 28 U.S.C. § 1446(a), copies of all process, pleadings and orders served upon Defendants in this action are attached hereto as Exhibit A.[2]

3. The Petition is Mr. Weinberg's latest attempt to challenge the NFLPA's authority under federal law to regulate the conduct of Contract Advisors who serve on the union's behalf. Mr. Weinberg has previously unsuccessfully challenged the application of the NFLPA's Regulations to him as alleged in this action, before the United Stated District Court for the Eastern District of Virginia and in various arbitrations.

4. At the time the Petition was filed, three independent grounds for removal of this case existed: (1) Mr. Weinberg's state law claims depended upon substantial analysis of the National Football League Collective Bargaining Agreement ("CBA") and the NFLPA Regulations, and are thus completely preempted under Section 301 of the Labor-Management Relations Act ("LMRA"); (2) Mr. Weinberg's state law claims challenged the NFLPA's exclusive bargaining power under Section 9 of the National Labor Relations Act ("NLRA"), and are thus completely preempted by that statute; and (3) Mr. Weinberg improperly joined the non-diverse defendants in this

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[2] In accordance with the local rules, an index is attached to these documents that identifies each document and indicates the date the document was filed in the state court. See L.R. 81.1.

lawsuit. At the time of removal, these same independent grounds for removal existed. Thus, this Court has diversity jurisdiction over the state court action.

5. All of the Defendants to this action have consented to its removal, (see Exhibit B), and hereby reserve the right to assert any and all defenses to the allegations set forth in the Petition. Moreover, Defendants do not admit any of the factual allegations in the Petition and expressly reserve the right to contest those allegations at the appropriate time.

JURISDICTION AND VENUE

6. This Court has federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337. Resolution of Mr. Weinberg's Petition requires substantial analysis of the CBA and the Agent Regulations. Accordingly, this case falls within the exclusive jurisdiction of the United States district courts pursuant to Section 301 of the LMRA. See 29 U.S.C. § 185.

7. Mr. Weinberg's challenge to the exclusive bargaining power of the NFLPA – a federal certified union – also creates federal question jurisdiction under Section 9 of the NLRA. See 29 U.S.C. § 159(a).

8. In addition, this Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)(1). There was complete diversity of citizenship between the Plaintiff, who is a Texas resident, and the properly named Defendants, who are non-Texas residents, at the time of the filing of the case in state court and there is complete diversity of citizenship at the time this Notice of Removal is being filed. (See Petition ¶¶ 1-12.) (Defendants Collins and Washington, who have been improperly joined, infra, are the only Defendants who reside in Texas). Moreover, the amount in controversy exceeds

$75,000.00. (See id. ¶ 93.)

9. Venue is proper in this district pursuant to 28 U.S.C. § 1441(a) because this Court is the United States District Court for the district and division embracing the place where the removed state court action has been pending.

GROUNDS FOR REMOVAL

10. There are three independent grounds for removing the state court action to this Court: (1) complete preemption under Section 301 of the LMRA; (2) complete preemption under Section 9 of the NLRA; and (3) diversity jurisdiction.

I. Removal Is Proper Pursuant To Section 301 Of The LMRA.

11. The Supreme Court has held that "Section 301 governs claims founded directly on rights created by collective-bargaining agreements, and also claims substantially dependent on analysis of a collective bargaining agreement." Caterpillar Inc. v. Williams, 482 U.S. 386, 394 (1987). The Supreme Court has further held that state law claims governed by Section 301 are completely preempted by federal law and thus removable. See Avco Corp. v. Machinists, 390 U.S. 557 (1968).

12. Here, resolution of Mr. Weinberg's state law claims will require "substantial analysis" of the CBA, since, for example, the CBA prohibits NFL employer Clubs from negotiating with agents other than those certified by the NFLPA under the NFLPA Regulations, and the CBA confirms that agents can be suspended immediately in "extraordinary circumstances," as occurred with Mr. Weinberg. Accordingly, Mr. Weinberg's state law claims are completely preempted by Section 301 of the LMRA, and thus removable.

13. The NFLPA Agent Regulations also constitute an agreement subject to Section 301 of the LMRA. Mr. Weinberg's state law claims require

"substantial analysis" of, and are "founded directly" on, the NFLPA Regulations. (See, e.g., Petition ¶ 54 (alleging that Defendants "violated the Regulations"), ¶ 63 (alleging that Defendants "took away Weinberg's right to a stay pending appeal" under Section 6 of the NFLPA Regulations).) Mr. Weinberg's state law claims are thus completely preempted by Section 301 – and removable – for this additional reason.

14. The Court may take judicial notice of the fact that, on or about May 2, 2006, Mr. Weinberg filed a lawsuit against an NFL player challenging the NFLPA agent arbitration process in Virginia state court (the "Virginia Action"), which was also removed on the grounds that the state law claims implicated the NFLPA Regulations and were thus completely preempted under Section 301 of the LMRA. (See Petition and Application to Vacate Arbitration Award, Weinberg v. Sowell, Case No. 2006-5384 (attached hereto as Ex. C); Notice of Removal, Weinberg v. Sowell (attached hereto as Ex. D).)[3] Mr. Weinberg did not move to remand the case, and the District Court, in a subsequent Order granting the NFLPA's motion to intervene, concluded that it had federal question jurisdiction over the action. (See Order at 2; Weinberg v. Sowell (attached hereto as Ex. E).)[4]

II. Removal Is Proper Pursuant To Section 9(a) Of The NLRA.

15. Pursuant to Section 9(a) of the NLRA, the NFLPA has the exclusive authority to bargain with NFL employer Clubs on behalf of its union members. See 28 U.S.C. § 159(a). Thus, to the extent that the NFLPA elects to delegate a portion

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[3] In that case, Mr. Weinberg sought to vacate an arbitration award in which his attempt to collect fees from a former client was denied. The district court confirmed the arbitration award.

[4] In light of the decision of the District Court for the Eastern District of Virginia finding federal question jurisdiction, Mr. Weinberg should now be precluded, under settled principles of issue and other preclusion, from challenging this Court's federal question jurisdiction or the appropriateness of a federal forum to adjudicate these fundamentally federal issues of law.

of its bargaining powers to certain Contract Advisors, it has the exclusive authority under federal labor law to regulate the conduct of such agents. See Collins v. National Basketball Players Association, 850 F. Supp. 1468, 1475 (D. Colo. 1991), aff'd 976 F.2d 740 (10th Cir. 1992) ("A union may delegate some of its exclusive representational authority on terms that serve union purposes, as the NBPA has done here. The decision whether, to what extent and to whom to delegate that authority lies solely with the union.").

16. Mr. Weinberg's state law claims arise out of his decertification as an NFLPA Contract Advisor and thus constitute a direct attack on the NFLPA's authority under Section 9(a) of the NLRA to regulate agents to whom it delegates a portion of its federal bargaining powers. Under the governing law of this Circuit, Mr. Weinberg's state law claims are thus removable by virtue of complete preemption under Section 9 of the NLRA:

> The Union's right to act as plaintiffs' bargaining agent is conferred by the NLRA and we hold that the duties corresponding to this right conferred by federal labor law are likewise defined solely by federal labor law. As a result of this complete preemption of state law, we further hold that the district court had removal jurisdiction over these actions.

Richardson v. United Steelworkers of America, 864 F.2d 1162, 1165 (5th Cir. 1989).

III. Removal Is Proper Because The Non-Diverse Defendants Were Improperly Joined.

17. This Court also has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1332 because there is complete diversity among the properly joined parties to this Action and the amount in controversy exceeds $75,000, as alleged by the Plaintiff, exclusive of interest and costs.

18. At the time he filed the Petition, Plaintiff alleges he was a citizen of Texas. (See Petition ¶ 1.) At the time of the filing of this Notice of Removal, upon information and belief, Plaintiff remains a citizen of the State of Texas. (See id.)

19. The National Football League Players Association was at the time of filing of this case and at the time of filing of this notice of removal organized under the laws of the Commonwealth of Virginia and had, at both of those times, its principal place of business in the District of Columbia, so it was not at the time of filing of the case and is not now a citizen of the State of Texas.

20. Richard Berthelsen was at the time of filing of this suit and is at the time of the filing of this removal petition a resident and citizen of the Commonwealth of Virginia.

21. Gene Upshaw was at the time of filing of this suit and is at the time of the filing of this removal petition a resident and citizen of the Commonwealth of Virginia.

22. Tom DePaso was at the time of filing of this suit and is at the time of the filing of this removal petition a resident and citizen of the Commonwealth of Virginia.

23. Trace Armstrong was at the time of filing of this suit and is at the time of the filing of this removal petition a resident and citizen of the State of Florida.

24. Keith Washington was at the time of filing of this suit and is at the time of the filing of this removal petition a resident and citizen of the State of Texas.

25. Thomas Agnone was at the time of filing of this suit and is at the time of the filing of this removal petition a resident and citizen of the State of Maryland.

26. John Collins was at the time of filing of this suit and is at the time of the filing of this removal petition a resident and citizen of the State of Texas.

27. Howard Shatksy was at the time of filing of this suit and is at the time of the filing of this removal petition a resident and citizen of the State of Maryland.

28. Mark Levin was at the time of filing of this suit and is at the time of the filing of this removal petition a resident and citizen of the Commonwealth of Virginia.

29. Removal is appropriate where non-diverse defendants have been improperly joined in order to defeat diversity jurisdiction. See Larroquette v. Cardinal Health 200, Inc., 466 F.3d 373, 375-76 (5th Cir. 2006); Kaddouri v. Merrill Lynch, Pierce, Fenner, & Smith, 2005 WL 283582, at *1-2 (N.D. Tex. Feb. 4, 2005). "Improper joinder" may be established by showing that the plaintiff cannot establish a cause of action against the improperly joined defendants. See Kaddouri, 2005 WL 283582, at *1.

30. Here, the claims against the two non-diverse Defendants – Messrs. Washington and Collins – are frivolous on their face. There is no possibility of recovery by the Plaintiff against either of the two in-state Defendants. See Smallwood v. Illinois Cent. R. Co., 385 F.3d 568, 573 (5th Cir. 2004). That is, there is no reasonable basis for this court to predict that Plaintiff might be able to recover against the in-state Defendants. See id.

31. The sum total of the allegations against Mr. Washington, an NFL player and a former client of Mr. Weinberg's, is that he submitted a letter to the NFLPA that formed the basis of a disciplinary action against Mr. Weinberg. (See Petition ¶ 67.) That allegation does not state any claim against Mr. Washington. Indeed, even if the

alleged letter was false – which Mr. Weinberg does not allege – the alleged letter still could not give rise to claims against Mr. Washington. See Morris v. Nowotny, 398 S.W.2d 661, 662 (Tex. App. 1966) (holding that there is no Texas state law cause of action based on allegations of willfully and intentionally providing false evidence in a court proceeding).

32. With respect to Mr. Collins, who defended various NFL players in the garnishment proceeding brought against them by Mr. Weinberg's former partner, the Petition alleges that he provided false testimony at Mr. Weinberg's disciplinary hearing. (See Petition ¶¶ 82, 83.) Even if Mr. Collins's testimony was false (which it was absolutely not), "[i]t is fundamental that in the absence of a statute to the contrary, an unsuccessful litigant who has lost his case because of perjured testimony, cannot maintain a civil action against the person who commits the perjury. There is no statutory provision in Texas creating such a right." Kale v. Palmer, 791 S.W.2d 628, 632 (Tex. App. 1990).

33. Moreover, it is axiomatic that "a lawyer's professional duty…does not extend to persons whom the lawyer did not represent." Aguirre v. Reyna, 2004 WL 35471, at *3 (Tex. App. Jan 8, 2004); Barcelo v. Elliott, 923 S.W.2d 575, 576-77 (Tex. 1996) (attorneys do not owe a duty of care that could give rise to malpractice liability to will beneficiaries who the attorney does not represent). Mr. Weinberg thus has no ability to establish any cause of action against Mr. Collins.

34. Defendants believe that there is no good faith basis for Mr. Weinberg's complaint allegations against these individuals, and that such allegations are being made solely to improperly join these parties. See Westcott Holdings, Inc. v.

Monitor Liability Managers, Inc., 2006 WL 3041616, at *2 (S.D. Tex. Oct. 24, 2006) ("If, after examining the pleadings, the court determines that it is appropriate to pierce the pleadings and conduct a summary inquiry, limited discovery into jurisdictional facts might be appropriate.").

CONCLUSION AND REQUESTED RELIEF

For the reasons stated above, Defendants respectfully request that this Court proceed with this matter as if it had been originally filed in this Court. Defendants further request any such other relief to which they may be justly entitled.

Dated: December 18, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via United States certified mail, return receipt requested on December 18, 2006, on the following parties:

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